Nos. 47–48

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

v.

PENNSYLVANIA RAILROAD COMPANY, ET AL.

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The two opinions of the United States District Court for the District of New Jersey (R. 109–129, 141–143) are reported in 55 F. Supp. 473.

The court appended findings of fact and conclusions of law (R. 129–140, 143–147) to its opinions. The report (R. 60–73) of the Interstate Commerce Commission assailed herein is reported in 248 I. C. C. 109. Related reports of the Commission (R. 423–443, 35–53, 55–60, and *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*) are reported in 195 I. C. C. 215, 206 I. C. C. 328, 237 I. C. C. 97, and 226 I. C. C. 7.

JURISDICTION

The final decree of the district court was entered on December 8, 1943 (R. 147–148). The petitions for appeal were presented and allowed on January 28, 1944 (R. 148–149) and on January 31, 1944 (R. 154–156).

Upon consideration of the jurisdictional statements, this Court, on April 24, 1944, issued a rule to show cause returnable May 1, 1944, as to why the case should not be dismissed as moot. Upon consideration of the jurisdictional statements and the returns to the rule, the Court on May 8, 1944, noted probable jurisdiction and discharged the rule to show cause (R. 1378).

Jurisdiction is conferred by the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 47, 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 345, par. (4)).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 49–61.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission has authority to require railroads, parties to through routes with a water carrier, to permit the use of their cars by the water carrier, for reasonable compensation.

2. Whether the Commission has jurisdiction to require railroads to permit use of their cars by a water carrier operating between American ports through extraterritorial waters and via a foreign port.

3. Whether the compensation fixed by the Commission for Seatrain's use of railroad cars is confiscatory or unreasonable.

4. Whether the Commission's order is invalid because not running in terms against Seatrain.

STATEMENT

Fifteen railroads (herein referred to as appellees) instituted the present suit (R. 5–19, 109–110) in a statutory three-judge district court to set aside an order (R. 73–74) of the Interstate Commerce Commission issued on October 13, 1941, and based on its report (R. 60–73) of the same date. The United States was the defendant below, and the Interstate Commerce Commission, Seatrain Lines, Inc. (herein referred to as Sea-

train), the New Orleans and Lower Coast Railroad (herein referred to as the Lower Coast), and the Hoboken Manufacturers' Railroad Company (herein referred to as the Hoboken), intervened as defendants (R. 91, 98–99, 103). The order attacked required some fifty-two railroads, according to their participation in through rail-and-water routes with Seatrain in interstate commerce between Belle Chasse, Louisiana, and Hoboken, New Jersey, to cease and desist from prohibiting the interchange of their freight cars for transportation by Seatrain in such interstate commerce. It also required the railroads to establish reasonable rules for such freight car interchange corresponding with the current code of per diem rules governing the interchange of freight cars between railroads, including the current rate of $1 per car per day, such per diem to be payable by Seatrain only for such periods as the cars were in its actual possession. (R. 73–74.)

From January 1929 to October 6, 1932, Seatrain and its predecessor operated vessels between Belle Chasse, Louisiana, and Havana, Cuba, on which freight was transported in standard railroad cars loaded on the vessels[1] (R. 427, 432, 37, 55–56). During this time, the railroads freely permitted use of their cars by Seatrain at the prevailing railroad per diem rate of $1 per day (R. 45, 65–66). On October 6, 1932, similiar service with

[1] For a description of Seatrain's operations, see *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368.

railroad cars was added by Seatrain in interstate commerce between Hoboken and Belle Chasse (R. 427, 37, 55–56). Most of these interstate vessels sailed by way of Havana, Cuba, but others sailed directly between the two American ports (R. 111).

The Seatrain loading facilities in New Jersey are owned by the Hoboken and, together with the piers and necessary supporting tracks, are leased by Seatrain. The Hoboken, a terminal switching railroad, connects with the Erie Railroad and through the Erie interchanges cars with all the trunk lines serving New York harbor. Seatrain's Belle Chasse loading facilities are on the property of the Lower Coast. The Lower Coast, a switching line, connects with the Southern Pacific and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans and through them interchanges cars with all railroads reaching New Orleans. (R. 37–38.) Seatrain's service is superior to that afforded by steamships of the ordinary type (R. 42–43; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 20–21).

Shortly after the inauguration of Seatrain's interstate service, the Association of American Railroads promulgated the following car service rule, aimed at Seatrain (R. 38, 44–45):

> Rule 4—Cars of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division.

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A large number of railroads, however, voluntarily consented to the delivery of their cars to Seatrain for use both in its Cuban and in its interstate service at the regular railroad $1 per diem rate. And nineteen railroads, including seven of the fifteen appellees (see R. 505–506, 1154), consented to the use of their cars by Seatrain at such rate in its Cuban, but not in its interstate, service. (R. 65–66.) The appellees are attacking the Commission's ruling in order to stifle Seatrain's competition with them for freight traffic to the Mississippi gateways (R. 43).

In 1932 and 1933, the Hoboken and the Lower Coast filed two separate complaints with the Commission attacking the refusal of the railroads to permit their cars to be used by Seatrain. Seatrain intervened in both these complaints. (R. 38.) These complaints, which were consolidated, have now come before the Commission on three different occasions (R. 133, 137). In *Investigation of Seatrain Lines, Incorporated*, 206 I. C. C. 328 (R. 35–53), the Commission, affirming its earlier conclusions in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215 (R. 423–443), held in 1935 that Seatrain was a common carrier by water subject to its jurisdiction; that Seatrain's interstate operations were in the public interest and "of advantage to the convenience and commerce of the people"; that the Commission had jurisdiction to require the establishment of through routes between rail and water carriers and, where such

through routes were established, to require the rail carriers, parties thereto, to interchange cars with the water carriers; and that it had no jurisdiction over Seatrain's Cuban service. The Commission, however, left open the question whether through routes existed between Seatrain and the railroads which refused to permit use of their cars by it, and, if not, whether such through routes should be established.

In the companion case, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, the Commission in 1938 found that certain through routes existed between railroads and Seatrain, and prescribed others,[2] together with joint rates. These joint rates were modified on further hearing in the same case in 1940 (243 I. C. C. 199) in order not to exceed the joint rates over comparable routes between the railroads and the so-called "break-bulk" water lines, which do not use railroad cars. It is not disputed that appellees are thus parties to through routes with Seatrain.

In 1940, the two original complaints seeking car interchange again came before the Commission in *Hoboken Manufacturers Railroad Co.* v. *Abilene & Southern Railway Company*, 237 I. C. C. 97 (R. 55–60). It was there held that the period of time and manner in which Seatrain should pay for the use of the railroad cars, the amount of

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[2] Those appellees ordered in 1938 to establish through routes with Seatrain have done so and participate therein (R. 11).

compensation it should pay, and any other appropriate conditions were all questions properly in issue in connection with car interchange, and that the case should be reopened for further hearing. On October 13, 1941, after such further hearing, the Commission, through Commissioner Eastman, issued its final decision (248 I. C. C. 109; R. 60–73). This decision reaffirmed the Commission's jurisdiction to require the railroads, parties to through routes with Seatrain, to permit the use of their cars by it in its interstate service, but not in its Cuban service. It found that the railroads' refusal to permit such interchange was in violation of the Interstate Commerce Act, and that the current code of per diem rules governing the interchange of freight cars between the various railroads, including the current inter-railroad rate of $1 per day to be payable by Seatrain for such periods as the cars were in its actual possession, would be reasonable for application to the interchange of cars with Seatrain. On the same date, the aforementioned cease and desist order now under attack was issued by the Commission to carry out the above findings (R. 73–74).

On October 9, 1943, the three-judge district court handed down an opinion (R. 109–129), together with findings of fact and conclusions of law (R. 129–140). In its conclusion of law, the court held (R. 140):

> 1. The case is not moot.
>
> 2. The Commission acted within its statutory power in requiring the railroads to

permit the use of their cars by Seatrain insofar as such transportation is within the United States or its territorial waters.

3. The Commission did not base its decision upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission insofar as such through routes are within the United States or its territorial waters. In requiring the rail carriers to permit the use of their cars by Seatain, a carrier by water, the Commission did not exceed the authority conferred upon it by statute.

4. The orders of the Commission are beyond the statutory power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port. Neither the Interstate Commerce Act nor any other statute authorizes the Commission to require carriers by railroad to permit such use of their cars.

5. The orders of the Commission are based upon a mistake of law in that in making them the Commission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars for the transportation referred to in the preceding paragraph.

The court remarked (R. 129, fn. 17; R. 141) that it did not believe Seatrain could maintain routes

between Hoboken and Belle Chasse entirely within the United States and its territorial waters and that it appreciated the effect which its ruling, if upheld, would have upon Seatrain's transportation.

On December 8, 1943, the court handed down a supplemental opinion (R. 141–143), findings of fact (R. 143–146) and conclusions of law (R. 147), holding that the findings of the Commission as to the compensation to be paid by Seatrain to the railroad companies for the use of their cars are supported by the evidence, and that the rate of compensation of $1 per day to be paid by Seatrain to the railroads for the use of their freight cars while in the actual possession of Seatrain "is not confiscatory but is reasonable" (R. 147).

In No. 47, the Government and co-appellants assert that those parts of the opinion below embodied in Conclusions of Law, Nos. 4–5, *supra*, are erroneous (see R. 149–151). In No. 48, fifteen trunk-line railroads[1] (R. 5) complain that the district court should have set aside the Commission's 1941 order (R. 73–74) in its entirety (see R. 156–163).

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission has authority to require carriers by railroad subject

[1] For the sake of convenience, these railroads are termed appellees throughout this brief.

to its jurisdiction to permit the use of their cars by Seatrain, a common carrier by water, at reasonable compensation for such use, notwithstanding that Seatrain is not a rail carrier. This Court has recognized that by amendments to the Interstate Commerce Act, Congress has emphasized its intention to broaden the Commission's control over rail and water transportation. *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 274 U. S. 29, 36. Carriers by railroad, in the operation of through routes, may be obliged to permit their car equipment to be carried beyond their own lines (*Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 91), and there is nothing in the broadening provisions of the Act as amended to indicate that the Commission's authority as to car service and the interchange of cars is any the less where the interchange is between rail and water carriers. In fact, Section 1 (4) makes it the duty of certain common carriers, such as the appellees, to establish through routes with other carriers, to furnish transportation, which is defined as including cars, upon reasonable request, and "to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation." Furthermore, Section 3 (4) requires such carriers to afford all reasonable facilities for the interchange of traffic between their lines and connecting lines, and Section 15 (3) provides that the Commission may establish the terms

and conditions under which through routs shall be operated.

II

Section 15 (3) of the Interstate Commerce Act empowers the Commission to require rail carriers to interchange cars with a carrier by water whose interstate operations traverse extraterritorial and foreign waters. Because of the terminology of Section 15 (3), the restriction of the Commission's jurisdiction in Part I to transportation taking "place within the United States" (sec. 1 (1) (b)) is no bar. Cf. *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 274 U. S. 29. As the legislative history reveals, the Commission's power in this connection was not removed by the 1940 repeal of Section 6 (13) (b). The 1940 Act embodied the substance of that Section in new provisions and in effect confirmed the Commission's jurisdiction.

Even if the application of the statutory interchange obligation to the circumstances here presented is considered extraterritorial legislation, such legislation is neither unusual nor in excess of Congressional power. *Knott* v. *Botany Mills*, 179 U. S. 69; *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 129.

III

The rate of $1 per day fixed by the Commission for Seatrain's use of appellees' cars is, as the

court below held, neither confiscatory nor unreasonable. The past treatment of Seatrain by appellees indicates the appropriateness of this rate. The connecting carriers are also amply remunerated for per diem payments borne by them during the period cars are held for Seatrain. Since there is a rational basis for the Commission's decision, its order must be sustained. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

IV

While the order does not run against Seatrain, it is not therefore defective. Seatrain was not a defendant, but an intervening complainant. The violations of the Act were found to be caused by the rail defendants and not by Seatrain; consequently, the order could not properly be directed against the latter carrier. If appellees are not paid the $1 per day directed by the Commission in its 1941 order, they obviously do not have to permit the delivery of their cars to Seatrain.

ARGUMENT

I

THE INTERSTATE COMMERCE COMMISSION HAS AUTHORITY TO REQUIRE RAILROADS, PARTIES TO THROUGH ROUTES WITH A WATER CARRIER, TO PERMIT THE USE OF THEIR CARS BY THE WATER CARRIER, FOR REASONABLE COMPENSATION

On the ground that Seatrain is a carrier by water rather than a carrier by rail, appellees will

presumably contend, as they did below, that the provisions of the Interstate Commerce Act impose no duty upon them to permit their freight cars, for reasonable compensation, to be interchanged with Seatrain, whose operations, via through routes between it and the appellee railroads, the Commission found to be in the public interest (R. 43, 51, 57; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 20–21, 29, 34). However, the Commission's order requiring appellees to interchange their freight cars with Seatrain is amply supported by Sections 1 (4), 3 (4), and 15 (3) of Part I of the Act (Appendix, *infra*, pp. 51–52, 53, 56).

If Seatrain were a railroad, the appellees would not be justified in refusing to permit their cars to be delivered to it for the purpose of accomplishing the through transportation of freight, and the Commission would be fully authorized to require the establishment of reasonable rules and regulations as to such interchange and compel compliance therewith. *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 91; *Missouri & Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39. We submit that the duties of railroads in the public interest or the Commission's authority as to car service and interchange are the same where a water carrier[4] is concerned

[4] There are at least twelve water carriers equipped to participate in the through movement of freight in cars (R. 501).

as in the case of an interchange between rail carriers.[5]

In its report of February 5, 1935 (R. 35–51), the Commission fully discussed the question of its authority to require the appellees to supply Seatrain with equipment or to turn over such equipment to Hoboken and Lower Coast, the complainant terminal railroads, for Seatrain's use. In upholding its authority, the Commission relied (R. 46–50) upon Sections 1 (4), 1 (10–17) (known as the car service provisions), 3 (3) (now 3 (4)), and 6 (13) (known as the Panama Canal Act) of the Interstate Commerce Act as it existed in 1935. Although we believe that the Commission's interpretation of those provisions was correct, a discussion of them as they then stood would be academic in view of subsequent amendments which are of course controlling. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538. The present provisions should be broadly construed since they "emphasize the intention of Congress to broaden the control of the Interstate Commerce Commission over rail-and-water transportation and, generally, to extend the regulatory power of that body over all such transportation

[5] The duty of carriers to interchange freight with one another is not dependent upon a showing of discrimination between connecting carriers. *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 363.

in the public interest." *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 274 U. S. 29, 36; see also *Interstate Commerce Commission* v. *Railway Labor Executives Ass'n*, 315 U. S. 373, 376.

Section 1 (4) of Part I of the Act requires "every common carrier subject to this part", which of course includes appellee railroads, to "provide and furnish transportation [6] upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation, to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

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[6] Section 1 (3) (a) (49 U. S. C. 1 (3) (a)) defines "transportation" as including railroad "cars, and other vehicles * * * and all instrumentalities and facilities of shipment * * *, irrespective of ownership * * *."

By Section 3 (4) (which was formerly Section 3 (3)), carriers such as appellees are required to "afford all reasonable * * * facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines." Such carriers are not to "discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper." A "connecting line" is defined in the same Section as "the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III".

Section 15 (3) empowers the Commission to "establish through routes * * * applicable to the transportation of * * * property * * * by carriers by railroad subject to this part and common carriers by water subject to part III * * * and the terms and conditions under which such through routes shall be operated."

Because of these provisions, appellees, as the court below pointed out (R. 118), concede that they are required to establish through routes with carriers by water, but they do not concede that they may be required to interchange cars with such carriers.

In view of the statutory obligation of carriers to maintain through routes and facilities for

operating through routes (secs. 1 (4) and 3 (4)), the Commission frequently has held that it may require the interchange of cars between rail carriers where they are parties to a through route. *E. g., Missouri & Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39, cited with approval in *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 91; *Colorado Coal Traffic Ass'n* v. *C. & S. Ry. Co.*, 24 I. C. C. 618; *Chicago & North Western Ry. Reconsignment Rules*, 29 I. C. C. 620; *Doran & Co.* v. *N., C. & St. L. Ry. Co.*, 33 I. C. C. 523; *Omaha Grain Exchange* v. *Great Northern Ry. Co.*, 47 I. C. C. 532; *Car Supply Investigation*, 42 I. C. C. 657. It has held, too, that the railroads are under a duty to maintain through routes with common carriers by water and that it has jurisdiction to enforce this duty. *Colonial Navigation Co.* v. *New York, N. H. & H. R. R.*, 50 I. C. C. 625; *Pacific Navigation Co.* v. *Southern Pac. Co.*, 31 I. C. C. 472. Accordingly, in several cases rail carriers have been required to establish through routes with water carriers. *Flour City S. S. Co.* v. *Lehigh Valley R. Co.*, 24 I. C. C. 179; *Pacific Navigation Co.* v. *Southern Pac. Co.*, 31 I. C. C. 472; *Chattanooga Packet Co.* v. *Illinois Central R. Co.*, 33 I. C. C. 384. Sections 1 (4) and 3 (4), which are enforceable under Section 15 (3), impose as great an obligation to provide for the through transportation of freight by rail and water as by rail alone,

and also impose in both cases an equal obligation to provide the facilities reasonably required for the through movement of freight. In the present case, the Commission concisely stated the basis of its power, even before the enactment of Section 15 (3), to compel the delivery of railroad cars to water carriers (R. 48):

> As our power to enforce rules relating to the interchange of cars necessarily flows from the carriers' duty to establish through routes, and as the duty to establish through routes relates to water-rail routes as well as to all-rail routes, it seems apparent that our power to enforce rules relating to the interchange of cars between rail and water carriers, where such interchange might reasonably and appropriately be made, was, prior to the enactment of the Car Service Act (May 29, 1917) [Section 1 (10–17) of the Interstate Commerce Act] coextensive with our power to enforce rules relating to the interchange of cars between rail carriers.

Because Section 1 (4) provides that it is the duty of such carriers as appellees to furnish "transportation," which is defined in Section 1 (3) (a) as including cars, upon reasonable request, and "to provide reasonable facilities for operating such [through] routes [with carriers by water] and to make reasonable rules and regulations with respect to their operation routes", appellees' contention that they need not interchange cars with carriers by water would only be

tenable if the Section contained a proviso that no railroad should be under a duty to permit the interchange of cars with a water carrier or to make reasonable rules and regulations for such interchange even though the interchange of cars with a water carrier might constitute the most reasonable facility for operating through routes with the water carrier. Section 3 (4) requires that carriers such as appellees afford all reasonable facilities for the interchange of traffic between their lines and connecting lines, including those of water carriers. Appellees' contention would require reading into this Section a proviso that even if the delivery of cars should constitute a reasonable facility for the interchange of traffic, the Section would nevertheless impose no obligation upon a railroad to interchange cars in order to accomplish through transportation with a water carrier. Section 15 (3) gives the Commission the necessary power to compel appellees to fulfill the duty to interchange cars imposed upon them by Sections 1 (4) and 3 (4), for it permits the Commission to establish "the terms and conditions under which * * * through routes shall be operated."[1]

For a long period railroads and water carriers have interchanged cars (R. 48; see also

[1] Reciprocal obligations, enforceable under Section 307 (d), are imposed by Sections 305 (b) and 305 (d) upon water carriers with respect to rail carriers.

Pennsylvania Co. Operation of Transportation Co., 34 I. C. C. 47; *Grand Trunk Ry. Co. of Canada Operation of Car Ferry Co.*, 34 I. C. C. 49; *Buffalo, R. & P. Ry. Co. Operation of Car Ferry Co.*, 34 I. C. C. 52; *Grand Trunk W. Ry. Co. Operation of Car Ferry Co.*, 34 I. C. C. 54). In the instant case, the Commission found (226 I. C. C. 7, 29) that the reasonable and appropriate method of interchanging traffic moving over the appellees' and Seatrain's through routes was by the interchange of loaded cars. The correctness of this conclusion is even revealed by the past practices of appellees. For four years, they interchanged cars with Seatrain and its predecessor (R. 65). They have subsequently consented to the delivery of their cars to every water carrier except Seatrain (R. 503–506), and some of them have consented to their cars going to Cuba on Seatrain ships (R. 505–506, 1154).

The interchange of cars with water carriers, when this is the economical way of accomplishing through transportation is not only required by Sections 1 (4) and 3 (4) and enforceable under Section 15 (3) of the Act, but also to fulfill one of the underlying purposes of the Act, as disclosed in the National Transportation Policy (Appendix, *infra*, p. 49), *viz.*, to promote rail and water transportation. The power of the Commission to require railroads to interchange cars with water carriers is no more extreme than its power,

under Section 6 (11)[*], to require railroads to construct tracks to the piers of connecting water carriers and to provide other facilities for the unloading, handling and interchange of freight appropriate to break-bulk operations.

Without discussing Section 15 (3), the court below held (R. 120–121) that Sections 1 (10), 1 (11), 1 (13), and 1 (14) (a), which are among the car service provisions of the Interstate Commerce Act, enable the Commission to enforce the railroads' obligation to interchange cars. For the reasons given by the court below and by the Commission (R. 120–121, 48–49), the car service provisions do not diminish but rather facilitate

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[*] In an opinion dealing with Section 6 (11), the present Chief Justice remarked (*United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457, 462):

"The Panama Canal Act [see Section 6 (11) of the Interstate Commerce Act] is by its terms supplemental to the Act to Regulate Commerce, and its obvious purpose was to extend to rail carriers connecting with water carriers in interstate commerce the requirements of § 1, par. 9 of the earlier acts, c. 3591, 34 Stat. 585, 586, c. 309, 36 Stat. 547, for furnishing switching and car service to lateral branch railroads and private sidetracks. By § 6, par. 13 [now Section 6 (11) of the Interstate Commerce Act], so far as pertinent to the present inquiry, the commission is given authority to establish physical connection between the lines of the rail carrier and the dock of the water carrier, and to determine and prescribe the terms and conditions upon which the connecting tracks should be operated. It 'may either in the construction or the operation of such tracks determine what sums shall be paid to or by either carrier.'"

the Commission's ability to enforce appellee's statutory obligation to interchange cars. But the Commission had ample power to enforce this obligation before the enactment in 1917 (Esch Car Service Act, 40 Stat. 101–102) of the car service provisions (*Missouri & Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39, cited with approval in *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 91; *Colorado Coal Traffic Ass'n* v. *C. & S. Ry. Co.*, 24 I. C. C. 618; *Chicago & North Western Ry. Reconsignment Rules*, 29 I. C. C. 620, 624; *Doran & Co.* v. *N., C., & St. L. Ry. Co.*, 33 I. C. C. 523, 530; *Car Supply Investigation*, 42 I. C. C. 657, 672), and therefore the Commission's request for their enactment was not mainly motivated by this purpose (R. 48–49; see also *Car Supply Investigation*, 42 I. C. C. 657, 671). Contrary to appellees' assertion, the amendments to the car service provisions made by the Transportation Act of 1920 (41 Stat. 456, 476–477) did not lessen the Commission's jurisdiction but materially increased it. Hearings, H. Committee on Interstate and Foreign Commerce, H. R. 4378, 66th Cong., 1st sess., pp. 11–12; H. Rep. No. 456, 66th Cong., 1st sess., p. 17; 58 Cong. Rec. 8315–8316. In any event, Section 15 (3), as amended by the Transportation Act of 1940 (54 Stat. 899, 911), gives the Commission such power independently of the car service provisions.

II

THE COMMISSION HAS JURISDICTION TO REQUIRE RAILROADS TO PERMIT USE OF THEIR CARS BY A WATER CARRIER OPERATING BETWEEN AMERICAN PORTS THROUGH EXTRATERRITORIAL WATERS AND VIA A FOREIGN PORT

The Commission held it has no power to require appellees to deliver cars to Seatrain for use on Cuban railroads (R. 44, 59, 70–71). The United States and the Commission believe that this ruling is correct, for American railroads may not be required to furnish cars for use on foreign railroads. *St. Louis, B. & M. Ry. Co.* v. *Brownsville Nav. District*, 304 U. S. 295, 300. However, contrary to the Commission's rulings (R. 46–50; 59, 62; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 13–17), the statutory court, without discussing Section 15 (3) of the Act, accepted appellees' contention that the Commission lacks authority to require them to interchange cars with Seatrain in Seatrain's interstate operations between New Jersey and Louisiana via extraterritorial waters and Havana, Cuba. The court's theory was that Part I of the Act placed the statutory obligation to interchange cars upon railroads subject to that Part and that Section 1 (1) (b) renders Part I inapplicable to the transportation involved here. Section 1 (1) (b) limits the applicability of Part I to transportation which "takes" place within the United States". We maintain that this aspect of the decision below was erroneous in view of Section

15 (3), as amended by the Transportation Act of 1940 (54 Stat. 899, 911).

Section 15 (3) empowers the Commission to compel through routes and the terms and conditions under which such routes shall be operated, applicable to the transportation of property by "carriers by railroad subject to this part and common carriers by water subject to part III". It becomes necessary to refer to Part III to determine the meaning of "common carriers by water subject to part III". A "common carrier by water" is defined in Section 302 (d) of Part III as any person holding itself out to engage in the "transportation by water in interstate or foreign commerce". The latter term is defined in Section 302 (i) (2) as transportation of persons or property:

> * * * partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States.[9]

[9] The language of this Section is to be contrasted with the more restrictive language of Section 302 (i) (3), which deals

This definition of transportation by water in interstate or foreign commerce makes it apparent that the Commission has jurisdiction over water transportation "partly in the United States and partly outside thereof", but in such circumstances only "insofar as it takes place from a place in the United States to another place in the United States". Seatrain's interstate operation between Hoboken and Belle Chasse by way of Havana falls within the Commission's jurisdiction under this language, for it is transportation from a place in the United States to another place in the United States. If Congress had intended to mean that the Commission's jurisdiction was to be limited to water transportation entirely within the territorial waters in the United States, it would certainly have so provided expressly, as it has done with respect to the rail and motor portion of joint water-rail or water-motor transportation in the immedi-

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with transportation partly by water and partly by rail "from or to a place in the United States to or from a place outside the United States." The latter Section, as its language indicates, obviously is not pertinent to interstate transportation such as that here, where the foreign port is not the ultimate destination.

The House Committee report discusses Section 302 (i) as follows (H. Rep. No. 1217, 76th Cong., 1st sess., p. 20):

> In general terms the scope of regulation is all domestic water transportation or transportation by a combination of water, railroad, or motor vehicle, and also such transportation in foreign commerce to the extent that there is a movement from a point in the United States to another point in the United States either before or after transhipment at a place within the United States. * * *

See also H. Rep. No. 2832, 76th Cong., 3d sess., p. 82.

ately preceding language of this same Section. The language was chosen with care; it expresses clearly an intention that the Commission's jurisdiction should depend upon the origin and destination of the freight rather than upon whether the ship carrying it keeps its course entirely within United States territorial waters. And the present transportation is none the less from a place in the United States to another place in the United States because Seatrain vessels put in at Havana, Cuba, since the freight on the cars involved has an actual ultimate destination in another place in the United States, remains under United States customs seals and is not made accesible to Cuban authorities (see pp. ~~35-36~~ 36-37, *infra*). In a letter of March 20, 1939, to the House Committee on Interstate and Foreign Commerce, Commissioner Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission, voiced the Commission's objections to a provision in Part III (the water carrier provisions) of H. R. 2531, 76th Cong., 1st sess., which provided that the Act should apply to:

> (c) the transportation of passengers or property by water upon the inland, canal, or coastwise waterways of the United States, but shall not include common carriers engaged in the transportation of passengers or property upon the high seas, the Great Lakes, or in intercoastal commerce upon the Panama Canal.

His criticism was that this provision might be construed as repealing the jurisdiction the Commission had over railroad-controlled water carriers (such

as Seatrain) operating on the high seas. Hearings, H. Committee on Interstate and Foreign Commerce, H. R. 2531 76th Cong., 1st sess., pp. 1557, 1596. The present Section 302 (i) (2) was subsequently inserted by the House Committee and reported out four months later. 84 Cong. Rec. 9459, 9956. In this connection, the court below remarked (R. 123):

> Do the words of subparagraph (i) (2) extend the jurisdiction of the Commission to transportation throughout its whole course from a place to a place within the United States despite the fact that that course of transportation transverses extraterritorial waters and goes into a foreign port? We conclude that this was the intention of Congress. We think therefore that the Commission has jurisdiction over transportation such as that carried on by the petitioners and Seatrain, from state to state in the United States, throughout the whole course of that transportation even if it passes through foreign waters and into foreign ports.

Under appellees' contention, the applicability of Section 15 (3) would be restricted by Section 1 (1) (b) to transportation which "takes place within the United States", but "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, 215; *Kepner* v. *United States*, 195 U. S. 100, 125. Moreover, Section 6 (11) of the Act (formerly Sec-

tion 6 (13)), referring to transportation from point to point in the United States "through the Panama Canal or otherwise",[20] is also in Part I of the Act, and this Court did not hold it restricted by the general language of Section 1 (1) (b). *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 274 U. S. 29; see also *Lake and Rail Class and Commodity Rates*, 205 I. C. C. 101, 214 I. C. C. 93; *Consolidated Southwestern Cases*, 123 I. C. C. 203, 211 I. C. C. 601, 222 I. C. C. 229; *Luckenbach Gulf S. S. Co.* v. *Illinois Central R. Co.*, 163 I. C. C. 361. Still another departure in Part I from the general language of Section 1 (1) (b) may be found in Section 5 (14) (formerly Section 5 (19)) dealing with operations "through the Panama Canal or elsewhere." As the court below acknowledged (R. 122), the Commission has construed Section 5 (14) as applicable to carriers by water operating to or via foreign ports. *Peninsular and O. S. S. Co.*, 37 I. C. C. 432. The Commission has so held even after the Transportation Act of 1920 (41 Stat. 456, 474) established the present phraseology of Section 1 (1) (b). *New Orleans and Havana Car Ferry Service*, 188 I. C. C. 371; see also *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 15–16.

Three of the four decisions of the Commission in the instant case were handed down before the 1940 amendment of Section 15 (3), Appendix,

[20] The words "or otherwise" refer to transportation elsewhere than through the Panama Canal. *Augusta & Savannah Steamboat Co.* v. *O. S. S. Co.*, 26 I. C. C. 380, 384, 385.

infra, pp. 55–56. The Commission relied on Section 6 (13) as it then stood [11] in holding the interchange obligations of the Act (secs. 1 (4) and 3 (4)) applicable to appellees even though Seatrain's interstate operations between New Jersey and Louisiana are through extraterritorial waters and via a foreign port (*Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 14–16, R. 48, 49–50). Section 6 (13), which was enacted by the Panama Canal Act (37 Stat. 560, 568), then provided in part:

> When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten: * * *
>
> (b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

[11] This Section, as amended by the Transportation Act of 1940 (54 Stat. 899, 910), is now Section 6 (11).

Because Section 6 (13) (b) was repealed by the Transportation Act of 1940 (54 Stat. 899, 910), appellees assert that the Commission lacks power to require them to permit their cars to be used by a water carrier in transportation between American ports but via extraterritorial waters and a foreign port. The district court agreed with this contention, since it thought (R. 126) the Transportation Act of 1940 "emasculated" the Panama Canal Act.

The pertinent legislative history of the amendments made to the Panama Canal Act by the Transportation Act of 1940 (54 Stat. 899, 910) reveals that the amendments were not meant to "subtract" any of the Commission's power and that there was no Congressional intent "in any way to emasculate the Panama Canal Act", which contained Section 6 (13).[12]

Section 6 (13) (b), as it stood before its repeal by the 1940 Act,[13] became superfluous because

[12] See 86 Cong. Rec. 11270, 11273, 11274, 11285, 11541, 11611, 11612, 11630.

[13] Section 6 (13) (b) was removed by the House Committee on Interstate and Foreign Commerce, which advanced the following explanation (H. Rep. No. 1217, 76th Cong., 1st sess., pp. 12–13):

"Section 9 repeals subparagraph (b) of paragraph (13) of section 6. That subparagraph as now in effect limits the Commission's jurisdiction with respect to the establishment of through routes and joint rates by rail and water by providing that the Commission may prescribe only the maximum joint rate that may be charged. The bill gives the Commission full authority over rates by water carriers, including

under the 1940 Act its substance, insofar as empowering the Commission to determine "all the terms and conditions under which such lines [rail and water lines transporting property from point to point in the United States through the Panama Canal or otherwise] shall be operated", is embodied in the amended Section 15 (3) of Part I, together with Section 307 (d) of Part III (Appendix, *infra*, pp. 56, 60–61). In a letter to the Conference Committee considering the 1940 Transportation bill, Commissioner Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission, stated that the Commission did not object to the repeal of Section 6 (13) (b), for "other provisions of the bill [S. 2009, which became the Transportation Act of 1940] adequately cover this matter." Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., p. 23. In addition, it must be remembered that the 1940 Act was passed following the Commission's decisions herein holding that it had power to compel rail carriers to interchange cars with a water carrier even though the latter might traverse extraterritorial and foreign waters on its voyages between American ports.[*] The "well versed" Congressional Com-

authority to prescribe both the minimum and the maximum joint rail and water rates. It was necessary to repeal the subparagraph in paragraph (13) of section 6 which limits the authority as aforesaid."

[*] One of the factors motivating Senator Bennett Champ Clark's opposition to S. 2009, which became the 1940 Act, was

mittees on Interstate Commerce were presumably familiar with these decisions before the passage of the 1940 Act (see *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634, 642 (note 8), 648–649), and the Interstate Commerce Commission, which was instrumental in the drafting of the 1940 Act (see Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess.; 86 Cong. Rec. 10828, 10829, 11270, 11272, 11287, 11626, 11630, 11636, 11763), would certainly not have acquiesced in the diminution of its power suggested by appellees. In fact, the Commission regarded the 1940 Act as confirming its jurisdiction in the instant case (R. 62).

The construction for which we contend presents no real problem of extraterritorial exercise of Congressional power. All the carriers involved are American corporations doing business within the United States; all are admittedly subject, in general, to the Interstate Commerce Act; all car interchange would be accomplished within the United States; and there can be no doubt that all the Commission's orders in the premises can be effectively enforced against each party involved, including Seatrain.

Even if the application of the statutory interchange obligation to the circumstances here pre-

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his disagreement (86 Cong. Rec. 11613, 11635) with the Commission's 1935 decision (R. 35–53) in this case, but the bill was passed without the incorporation of his suggestions (86 Cong. Rec. 11766).

sented is considered extraterritorial legislation by Congress with respect to an American vessel on the high seas or in a foreign port, such legislation is not unusual or in excess of Congressional power. For example, Section 25 of the Interstate Commerce Act (repealed by the Transportation Act of 1940, 54 Stat. 899, 919) in certain contingencies required a railroad to issue a through bill of lading for property being transported by it and a water carrier to a destination in a foreign country and to deliver the freight to the vessel pursuant thereto (Appendix, *infra*, pp. 57–58). The Commission was, moreover, empowered to—

> make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading.

Under this provision the Commission undertook to prescribe a through export bill of lading, including provisions relating to water transportation to a foreign port. Other examples include the International Rules for Navigation at Sea (33 U. S. C. 61–142), the Carriage of Goods by Sea Act (46 U. S. C. 1300–1315), and the statutory provisions affecting the rights of crews and the obligations of masters of vessels with respect to seamen, which contain requirements and provide rights taking effect when American vessels are in foreign ports (46 U. S. C. 564–573). Also, certain provisions (46 U. S. C. 801, 815, 816, 821) of the Shipping Act of 1916 have been held applicable to prohibit

discriminations practiced by water carriers in a foreign country (*Compagnie Générale Transatlantique* v. *American Tobacco Co.*, 31 F. (2d) 663 (C. C. A. 2)), and Section 1 of the Harter Act (46 U. S. C. 190), making it unlawful for owners of vessels transporting property between American and foreign ports to contract out of liability for negligence in the handling of property committed to their charge, has been held applicable to negligent acts committed in foreign ports aboard a foreign vessel transporting property from foreign ports to an American port. *Knott* v. *Botany Mills*, 179 U. S. 69. Contrary to appellees' contention below, the power of Congress under international law to regulate American vessels on the high seas and in foreign ports was not denied, but was rather reaffirmed, in *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 129, where the Court said:

> In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. *Lord* v. *Steamship Co.*, 102 U. S. 541; *The Abby Dodge*, 223 U. S. 166, 176. But we do mean that the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limit its field of operation, like that of the

Amendment, to the territorial limits of the United States.

Admittedly, the local sovereign is not divested of authority over a foreign vessel in its port by the action of the foreign sovereign. But by international comity and practice the local authority is seldom exercised, in the absence of acts committed on board the vessel calculated to disturb the peace or dignity of the local country. *Wildenhus' Case*, 120 U. S. 1, 12. In the past, Cuba has exercised no authority over railroad cars in interstate service found on Seatrain vessels in Havana. As the Commission stated in *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 14:

> * * * that when the vessels call at Havana, cars containing interstate freight are placed under United States custom seals at the port of departure and remain so until arrival at the port of destination, and the freight contained in such cars is not made accessible to the Cuban authorities; that three sets of manifests are made out at the port of departure, one required by the Cuban authorities and another required by the United States customs relate to freight for Cuba, and the third, which shows only the cars moving in interstate commerce, is given the Cuban customs inspector as a matter of information; that *no Cuban official has ever attempted to take jurisdiction over the interstate freight*; and that there are no Cuban regulations affecting Seatrain's operations, but its vessels while

> at Havana are subject to all Cuban laws and regulations, such as those relating to quarantine and health, applicable to vessels of foreign register. [Italics supplied.]

The record is barren of anything affording a reasonable basis for the belief that this Cuban practice will be changed in the future, or that would justify the great apprehension which appellees professed below to feel for their interstate cars in Cuban waters.[15] But even the exercise of Cuban authority over these cars to some degree would not, after all, vitiate the concurrent Congressional power over American railroad cars on an American vessel in a Cuban port.

III

THE COMPENSATION FIXED BY THE COMMISSION FOR SEATRAIN'S USE OF RAILROAD CARS IS NOT CONFISCATORY OR UNREASONABLE

A. Appellees allege that the $1 per diem compensation fixed by the Commission for Seatrain's use of appellees' cars is confiscatory. The allegations of confiscation in the complaint (R. 12–13, 16, 17–18) do not meet the prescribed requirements of particularity (*Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447–448; *Beaumont, Sour Lake & W. Ry. Co.* v. *United States*, 282 U. S. 74,

[15] It should be noted that all the appellees from 1929–1932 permitted without objection their cars to be delivered to Seatrain for discharge at Havana and interchange with Cuban railroads (R. 65). Seven of the appellees permit such delivery at the present time (R. 505–506, 1154).

88–89; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53), but in case the Court chooses to overlook this procedural defect, we are discussing herein the confiscation issue. It is submitted, as the court below held (R. 141–147), that the $1 per diem rate is reasonable.

Appellees' argument that the standard interrailroad $1 per diem is confiscatory, when applied to use of their cars by Seatrain, may be summed up in the following propositions. It is contended (see R. 13) that this $1 per day rental, as between railroads, actually covers only the cost of ownership of cars when they are in "active and productive service." It is said (*idem*) not to cover the cost of car ownership when the cars are inactive or unproductive (*i. e.*, while cars are undergoing repairs, during slack periods when cars are idle for lack of demand, while cars are being switched in origin or destination switching service, while cars are held for consignors or consignees for loading or unloading, and while cars are moving empty). This additional burden for idle time, it is urged, the various railroads mutually and reciprocally share, either by owning and maintaining a fair share of cars for the national supply, or by paying for the use of other's cars during the remainder of the idle time, as, *e. g.*, when hauled empty. But it is pointed out (see R. 64) that Seatrain does not itself own and main-

tain any cars,[16] that it moves comparatively few empty cars,[17] that it does no switching, and that it does not need to hold cars for consignors and consignees situated on its line. Thus it is concluded (*idem*) that the $1 per diem rate to be paid by Seatrain does not result in Seatrain's bearing a fair share of the burden of car ownership in idle time.

The principal fallacy here lies in the fact that the inter-railroad per diem does cover the cost of

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[16] The Commission made the following statement concerning Seatrain's ownership of cars (R. 65):

"So far as car ownership is concerned, Seatrain has offered of record to acquire cars for interchange with the railroads if and when such acquisition is desirable from the standpoint of the car supply of the country. The witness from Car Service Division who testified on behalf of the association was unwilling, upon inquiry, to state that such acquisition would be desirable under the then existing circumstances. It appears, also, that Seatrain rents a substantial number of privately owned cars."

[17] The Commission made the following statement concerning Seatrain's movement of empty cars (R. 65):

"So far as the movement of empty cars is concerned, Seatrain holds itself ready to move in the home direction cars which it has moved in the opposite direction under load. It argues that it should not be penalized because it happens to have a well-balanced traffic and consequently can furnish loads for many such cars, or because the delivering railroads prefer to return others by rail. Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense."

car ownership, not only during periods of productive service, but also during idle periods. This is manifest from the following statement made by the Commission in 1925 in *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 378, which was quoted in the Commission's 1941 decision in the present case (R. 62; see also R. 64):

> The per diem rate is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 per cent interest on the investment. From the evidence of record, it is estimated that the cost of car ownership and maintenance averaged 83.812 cents per car day and $305.91 per car unit in the calendar year 1925, and approximately $1 per car day in that year for the periods cars were actually in service. Cars were idle a portion of the year, due in part to unserviceable condition, and in part to the fact that the supply of cars exceeded the demand.

The Commission pointed out in its 1941 report (R. 64) that the present cost does not exceed the $1 per day found reasonable in 1925. There has been no recommendation for a change in the per diem rate of $1 a car, and the Car Service Division of the Association of American Railroads has made no recommendation to the Board of Directors for a different per diem rate in connection with cars interchanged with Seatrain (R. 859, 843).

That the present inter-railroad per diem rate is not based upon the scheme of distribution of idle time burden by means of mutual car ownership and the other methods suggested by appellees, is established by the following excerpt from the Commission's 1941 report (R. 65):

> Of equal importance is the fact that as between railroads there is no such balancing of burdens as defendants would imply. Not all railroads own cars. Granting that the more important are car owners, there is no reason to believe that the ownership is always proportionate to car use. There are also railroads which, by reason of location, are essentially bridge carriers with much less than the normal amount of car origination, termination, and intermediate switching. There are railroads which, by reason of well-balanced traffic, have much less than the normal proportion of empty-car movement. The car-hire rules do not differentiate between railroads because of such differences in conditions.

The past treatment of other water carriers and of Seatrain itself, by the railroads, is another strong indication that the present $1 per diem would not be confiscatory as applied to Seatrain. Thus the Commission found (R. 65) that the regular railroad per diem rules and rates have been applied uniformly where cars are interchanged voluntarily with water lines, such as the various car ferries, which obviously do not own railroad cars and are comparable to Seatrain.

The Commission found, too, that all the railroads for nearly four years prior to inauguration of the interstate service by Seatrain freely interchanged cars with it and its predecessor in their Cuban service at the regular $1 per diem rate; that a large number of railroads, some of which were defendants before it, had voluntarily consented to the delivery of their cars to Seatrain at that rate for use even in its interstate service; and that 19 defendant railroads (seven of whom are appellees here; see R. 505–506, 1154) had continued to consent to the use of their cars by Seatrain in its Cuban service, though not in its interstate service, at the prevailing rate (R. 65–66). The fact that carriers voluntarily perform certain services at one charge for one group of individuals, has been recently recognized as a strong indication that an order of the Commission is not confiscatory which merely requires them to perform comparable services for others at the same charge. *Northern Pacific Ry. Co.* v. *United States*, 41 F. Supp. 439, 446 (D. Minn.), affirmed *per curiam*, 316 U. S. 346. The same principle is applicable here.

The considerable saving to the owner on car repair bills with respect to cars used by Seatrain cannot be overemphasized as a clear indication that the regular per diem rate paid by railroads is not confiscatorily low when paid by Seatrain. In this connection, the Commission found (R. 63) that repairs accounted for a large proportion of the cost of car ownership. It further found

(*ibid.*) that the railroads conceded that about 61.5 percent of the average running-repair expenses of sixteen cents per car per day, or about 9.8 cents, was avoided when cars were not moving, as when in use on Seatrain's vessels, and that the corrosive effect of the ocean atmosphere on the cars was negligible.

B. The Commission has found that since Seatrain is a water carrier with limited sailings, cars must be held at the ports of Hoboken and Belle Chasse awaiting arrival of its vessels (R. 66). The average detention of cars for Seatrain at Belle Chasse was found to be 3.3 days per car during the last six months of 1938 (R. 67). The Commission's order limited the time that Seatrain was to pay per diem to such periods as the cars were in its actual possession (R. 74). Since the switching railroad lines (the Hoboken and the Lower Coast) connecting with Seatrain do not bear the per diem rental paid to the owners of the cars for the periods they are held for Seatrain, the Commission's order means that such per diem cost must be borne by the connecting line-haul carriers (R. 145). Except for the Pennsylvania, the line-haul carriers serving Seatrain at Hoboken have consented to bearing such cost[18] (R. 68).

[18] The controversy between the Pennsylvania and the Hoboken as to the payment of per diem on Seatrain's traffic is the subject of pending litigation (R. 68). *Pennsylvania Railroad Co.* v. *Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Co.*, Civil No. 6-414; *idem*, Civil No. 19-307, United States District Court for the Southern District of New York.

But appellees contend (see R. 67) that the Commission's order, in relieving Seatrain of paying the per diem on cars thus held for it at New Orleans is an arbitrary and confiscatory departure from the practice followed between railroads. They cited below (see R. 67) Rule 15 (a) of the Code of Per Diem Rules (R. 1003) as showing the inter-railroad practice. That rule provides that a railroad failing to receive cars promptly from a connection shall be responsible to the connection for the per diem of the cars so held for delivery, including the home cars of such connection. It should be noted at the outset that the only railroads among appellees having any standing to raise this issue are the four[19] which serve Belle Chasse. The other car owners receive their per diem during such time in any event, and it is obviously immaterial to them whether they receive it from Seatrain or from the connecting Belle Chasse carriers. Only the connecting Belle Chasse carriers must either pay per diem for the cars of others or forego the use of their own cars, held during such periods for Seatrain (see R. 69).

Regardless of appellees' arguments, as the Commission's 1941 decision shows (R. 67, 69), the connecting carriers are amply remunerated for per diem payments borne by them during this holding period. The Commission found (R. 67–68, 69) that to place the burden of car detention

[19] Southern Railway, Louisville & Nashville, Southern Pacific, and Texas & New Orleans.

for Seatrain upon the connecting railroads would be to place a burden, closely analogous to the car detention burden involved with the "break-bulk" water carriers at New Orleans, on the same parties as bore it in connection with the "break-bulk" traffic.[20] Thus the decision indicates that cars had to be held for loading and unloading with the "break-bulk" carriers nearly as long as for Seatrain, even though the cars were not actually used by the "break-bulk" carriers. And, in addition, if the cars were not actually held, then the contents had to be stored awaiting arrival of the "break-bulk" vessels. These "break-bulk" car holding and storage expenses were in either event borne by the connecting railroads, the Commission found. (R. 67-68.) Furthermore, the Commission concluded (R. 69) that "this car detention in the case of traffic interchanged with water lines, caused by their infrequent service as compared with rail service, is a disability which has always been recognized and which is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic." The connecting railroads are thus specifically recompensed for the cost of detention of cars for Seatrain and the "break-bulk" lines either in their

[20] The reasonableness of treating Seatrain on a parity with the "break-bulk" lines is apparent when it is recalled that the two are close competitors and that in *Seatrain Lines, Inc. v. Akron, C. & Y. Co.*, 226 I. C. C. 7, the Commission ordered that Seatrain should have no higher joint rates with railroads than the "break-bulk" lines had.

divisions of joint rates or in their own proportional rates. Since the Commission's decision recognizes that the problem of car detention is one to be handled in the fixing of rates or divisions, if in the future it should develop that one of the New Orleans carriers is not in fact adequately remunerated for this car detention burden under existing rates, the carrier has the right to have the Commission make a proper adjustment in its rates (R. 69).

As we have shown, this case involves no "free use" of the railroad equipment of another as was the situation in *Chicago Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 96–97, relied upon below by appellees. Because there is a rational basis for the Commission's decision, its order must be sustained (*Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286–287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146), as it was below in this respect (R. 141–147).

IV

THE COMMISSION'S ORDER IS NOT INVALID BECAUSE NOT RUNNING IN TERMS AGAINST SEATRAIN

The complaint alleges that the order is arbitrary because it does not "run against or impose any obligation upon Seatrain" (R. 17). The order (R. 73–74) is to all intents a cease and desist order and runs against those railroads (R. 72–73) violating provisions of the Interstate Commerce Act. It does not and should not run

against Seatrain, an intervener in support of the complaint (see R. 98). The claim that the order does not impose an obligation on Seatrain to pay the $1 per diem compensation for the use of appellees' cars is without merit, because the order reads (R.74).

> * * * provided, however, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

If appellees are not paid the $1 per diem rate, they obviously are not required to permit the delivery of their cars to Seatrain.

Seatrain was informed by the Association of American Railroads that it was not eligible to membership in the Association (R. 214, 444). Appellees, by becoming parties to the Car Service and Per Diem Agreement (R. 450–451), have bound themselves to accept payment for their cars only from members (R. 216, 228, 330, 450, 519–820). Seatrain was denied the privilege of becoming a party to this Agreement (R. 214, 216, 820). Accordingly, it was unnecessary for the Commission to require Seatrain to make reports of its detention of cars directly to the owning lines and to make settlement of the per diem charges directly with them instead of through the complainants Hoboken and Lower Coast (R. 71). Seatrain has announced its willingness to become a party to the per diem rules agreement and to make direct settlement for car-hire with the

owners of the cars if appellees and other members of the Association amend their rules and articles of agreement to do so (see *idem;* see also R. 819–820, 540). Thus the Association of which appellees are members, under the order of the Commission, has the power to bring about the direct settlement which all parties seek (see *idem*).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below should be reversed insofar as it set aside any part of the Commission's orders involved herein, and sustained in all other respects.

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DECEMBER 1944.

APPENDIX

The National Transportation Policy, as set forth in the Transportaion Act of 1940, is as follows (54 Stat. 899):

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carry out the above declaration of policy.

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (1) (a) and (b) provides in part:

> That the provisions of this part shall apply to common carriers engaged in—
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> The transportation of passengers or property wholly by railroad, * * *;
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> * * * * * *
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> —from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States. (49 U. S. C. 1 (1) (a) and (b).)

Section 1 (3) (a) provides:

> The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transporta-

tion of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof. (49 U. S. C. 1 (3) (a).)

Section 1 (4) provides:

It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to Part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regula-

tions with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers. (49 U. S. C. 1 (4).)

Section 1 (10) provides:

The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part. (49 U. S. C. 1 (10).)

Section 1 (11) provides:

It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. (49 U. S. C. 1 (11).)

Section 1 (13) provides:

The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules

showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto. (49 U. S. C. 1 (13).)

Section 1 (14) (a) provides:

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. (49 U. S. C. 1 (14) (a).)

Section 3 (4) provides:

All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. (49 U. S. C. 3 (4).)

Section 5 (14) provides:

> Notwithstanding the provisions of paragraph (2), from and after the 1st day of July 1914, it shall be unlawful for any carrier, as defined in section 1 (3), or (after the date of the enactment of this amendatory section) any person controlling, controlled by, or under common control with, such a carrier to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense. (49 U. S. C. 5 (14).)

Section 6 (11) provides:

> When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate com-

merce, as amended June eighteenth, nineteen hundred and ten: (49 U. S. C. 6 (11).)

Section 15 (3), before amendment by the Transportation Act of 1940 (54 Stat. 899, 911), provided:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this chapter shall be subject to the laws and regulations applicable to

transportation by water. (49 U. S. C. A. 15 (3).)

Section 15 (3) provides:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section. (49 U. S. C. 15 (3).)

Section 25, as amended by the Act of April 16, 1936, 49 Stat. 1207, 1212, and before its repeal by the Transportation Act of 1940 (54 Stat. 899, 919), provided in part:

> (1) *Schedules to be filed by carriers by water in foreign commerce.* Every common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States, shall file with the Commission, within thirty days after this section becomes effective and regularly as changes are made, a schedule or schedules showing for each of its steam vessels intended to load general cargo at ports in the United States for foreign destinations (a) the ports of loading, (b) the dates upon which such vessels will commence to receive freight and dates of sailing, (c) the route and itinerary such vessels will follow and the ports of call for which cargo will be carried.
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> * * * * *
>
> (4) *Bills of lading; form and contents; liability of initial carrier.* When any consignor delivers a shipment of property to any of the places so specified by the Commission, to be delivered by a railway carrier to one of the vessels upon which space has been reserved at a specified rate previously ascertained, as provided herein, for the transportation by water from and for a port named in the aforesaid schedule, the railway carrier shall issue a through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge; but the carrier by railroad shall not be liable to

the consignor, consignee, or other person interested in the shipment after its delivery to the vessel. The commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier. *Provided, however,* that in so far as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act. (49 U. S. C. A. 25; 49 Stat. 1212.)

Part III of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended. Section 302 (d) provides:

> The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 902 (d).)

Section 302 (i) (2) provides:

> (i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce", as used in

this part, means transportation of persons or property—

* * * * *

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States;

* * * * *

(49 U. S. C. 902 (i) (2).)

Section 303 (a) provides:

In the case of transportation which is subject both to this part and part I, the provisions of part I shall apply only to the extent that part I imposes, with respect to such transportation, requirements not imposed by the provisions of this part. (49 U. S. C. 903 (a).)

Section 305 (b) provides:

It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for

reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers. (49 U. S. C. 905 (b).)

Section 305 (d) provides:

> All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to part I. (49 U. S. C. 905 (d).)

Section 307 (d) provides:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable

to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15. (49 U. S. C. 907 (d).)

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